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No. 03-656

In The

Supreme Court of the United States

AVE M. BIE, BURNEATTA BRIDGE, AND ROBERT M. GARVIN, Commissioners of the Public Service Commission of Wisconsin, in their official capacities,
Petitioners,

v.

WISCONSIN BELL, INC., d/b/a Ameritech Wisconsin, *et al.*,
Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AMICUS CURIE BRIEF SUPPORTING PETITIONER WISCONSIN PUBLIC SERVICE COMMISSION

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23 pp

QUESTION PRESENTED

The Telecommunications Act of 1996 ("Act") creates a national framework to develop local telecommunications competition. Two key provisions in that legislation, 47 U.S.C. §§ 251 & 252, created a critical State oversight role for the negotiation and arbitration of interconnection agreements and the development of statements of generally available terms and conditions ("SGATs"), pursuant to which competing local exchange carriers ("CLECs") can gain entry through interconnection, resale, or access to the incumbent local exchange carriers' ("ILECs") unbundled network elements. In the Act, Congress specified that (1) preemption is not to be implied, 47 U.S.C. §152 (§ 601, *codified in* notes) and (2) State commissions may implement pro-competition State measures consistent with the Act. 47 U.S.C. § 251(d)(3) & § 261.

The question presented is whether a State commission order that requires, without setting rates, terms, or conditions, the tariffed offering of certain combinations of an incumbent provider's unbundled network elements is consistent with the Act's provisions which specifically allow the creation of SGATs and expressly reserves existing State authority to enact additional pro-competitive measures.

PARTIES TO THE PROCEEDING & RULE 29.6 DISCLOSURE

The petitioners are Ave M. Bie, Burneatta Bridge, and Robert M. Garvin, in their official capacities as Commissioners of the Public Service Commission of Wisconsin. One original Commissioner defendant, Joseph P. Mettner, left office and was replaced by Burneatta Bridge on January 6, 2003.

Respondents in the case are Wisconsin Bell, Inc., d/b/a Ameritech Wisconsin (n/k/a SBC Wisconsin), the plaintiff-appellee, and WorldCom, Inc., an intervening defendant-appellant.

WorldCom, Inc has separately filed a Petition seeking a Writ of Certiorari on the same case (U.S. 03-603).

Pursuant to Supreme Court Rule 29.6, Amicus Curiae the National Association of Regulatory Utility Commissioners ("NARUC") states as follows: NARUC is a quasi-governmental non-profit association incorporated in the District of Columbia. NARUC has no parent corporation nor is there any publicly held corporation that owns stock or other interest in NARUC.

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IN THE

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No. 03-656

AVE M. BIE, BURNEATTA BRIDGE, AND ROBERT M. GARVIN, Commissioners of the Public Service Commission of Wisconsin, in their official capacities,

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NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AMICUS CURIAE BRIEF SUPPORTING PETITIONER WISCONSIN PUBLIC SERVICE COMMISSION

INTEREST OF AMICUS CURIAE[1]

The National Association of Regulatory Utility Commissioners ("NARUC"), a quasi-governmental organization founded in 1889, submits this brief in support of Petitioners Ave Bie, Burneatta Bridge, and Robert Garvin,

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[1] As per U.S. Sup. Ct. Rule 37(2)(a), (5), & (6), 28 U.S.C. (2003), NARUC (i) is filing signed forms from all parties granting consent for NARUC to file this brief and the required proof of service in this docket, and (ii) states that no counsel for another party authored the brief in whole or in part or made a monetary contribution meant to underwrite preparation of this specific brief.

Commissioners of the Public Service Commission of Wisconsin, in their official capacities ("Wisconsin").

NARUC, which Congress calls "*the national organization of the State commissions*", 47 U.S.C. § 410(c) (1971), presents the collective interest of State commissions charged with regulating conditions of service of the intrastate operations of, *inter alia*, telephone utilities in all fifty States and several U.S. territories. Both Congress and the Federal courts have long recognized that NARUC is a proper party to represent the collective interest of State regulatory commissions.[2]

Each of NARUC's members, like Petitioner Wisconsin, is a "State commission" as defined by Congress[3] under Section 252 of the Telecommunications Act of 1996.[4]

NARUC's member commissions have a vital interest in whether this Court accepts the Wisconsin petition for review. The Seventh Circuit decision that is the subject of the Wisconsin petition seriously undermines State

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[2] See, e.g., 47 U.S.C. § 254 (1996); *United States of America v. Southern Motor Carrier Rate Conference, et al.*, 467 F.Supp. 471 (N.D. Ga. 1979), aff. 672 F.2d 469 (5th Cir. Unit "B" 1982); aff. en banc, 702 F.2d 532 (5th Cir. Unit "B" 1983, rev'd, 471 U.S. 48 (1985). See also, *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976).

[3] 47 U.S.C. § 153(41).

[4] Pub. L. 104-104, 110 Stat. 56 (1996)(hereinafter referenced as "1996 Act" or "Act"). The Act is codified throughout Title 47 of the United States Code. References to the Act are to relevant sections of Title 47 and are denoted by the symbol "§," except as otherwise noted.

Commissions' ability to promote competition within their respective jurisdictions. It also heightens the prospects for additional appeals of other NARUC member commissions' existing practices. Duplicative additional litigation of the issues raised in this docket is inevitable in other circuits if the Court does not grant certiorari. By sustaining the facial challenge to the State-law tariffing requirement, the Seventh Circuit decision creates a clear split among the circuits.[5] The Seventh Circuit majority believes Congress intended the interconnection agreement process to be the only procedure that States can employ to promote local competition. See *Appendix of WorldCom's Petition for a Writ of Certiorari* (U.S. 03-603) at 5a-7a. It therefore found that the 1996 Act preempts Wisconsin's effort to "create an alternative method by which a competitor can obtain interconnection rights." *Id.* at 2a.

State commissions will be compelled to defend their decisions because of this split in authority combined with the fact that 7th Circuit's ruling is, on its face, so clearly at odds with both the express reservation of State authority in 47 U.S.C. § 251(d)(3) and specific provision in 47 U.S.C.

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[5] The Seventh Circuit's decision conflicts with *U.S. West Communications, Inc. v. Sprint Communications Co., L.P.*, 275 F.3d 1241 (10th Cir. 2002), which held that allowing competing carriers to take services from incumbent carriers' tariffs is not preempted by the negotiation and arbitration provisions of the 1996 Act. *See* 275 F.3d at 1249-51. It also conflicts with an order by the expert agency charged with interpreting the Act's provisions. See the FCC's order in *In re Public Util. Comm'n of Texas*, 13 F.C.C.R. 3460 (1997) ("*Texas Preemption Order*"), in which the FCC held that the 1996 Act did not preempt a State tariff as long as new entrants remained free to invoke the Act's negotiation and arbitration provisions. *Id.* ¶ 138-139.

§ 252(f) allowing, for certain ILECs, the tariff-like Statement of Generally Available Terms.[6]

Wisconsin is not alone.[7] Granting the writ petition and issuing a decision in the instant case will provide the

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[6] Some of the Court decisions effectively raise form over substance. The *MCI Telecommuns. Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157 (D. Or. 1999) decision held the structure of tariffs improperly permitted "off the rack" ordering of services that dispensed with interconnection agreements altogether. After the decision, the Oregon commission, given their obligations under the federal Act, went ahead to establish "UNE prices". However, because of the Court's decision, instead of requiring a "tariff", that Commission said the listed prices ". . .established by the Commission shall function as "initial" or "default" prices . . [and] . . shall be incorporated in interconnection agreements arbitrated by the Commission under the terms of the Act," unless the parties agree to different prices, or a parties could demonstrates there are "special costs" warranting a UNE price different from that established." See, *In the Matter of the Investigation into Compliance Tariffs filed by U S WEST Communications, Inc., Advice Nos. 1661, 1683, 1685, and 1690*, UT 138 and *In the Matter of the Investigation into Compliance Tariffs filed by GTE Northwest Incorporated, Advice Nos. 589, 599, and 611*, UT 139 Order No. 00-316, Oregon Public Utility Commission (Entered 6-19-00) at http://www.puc.state.or.us/orders/2000ords/00-316.pdf

[7] See, e.g., Cause No. 40611-S1 (Phase II), Order, *In The Matter Of The Commission Investigation And Generic Proceeding On Ameritech Indiana's Rates For Interconnection, Service, Unbundled Elements, And Transport And Termination Under The Telecommunications Act Of 1996 And Related Indiana Statutes*, Indiana Utility Regulatory Commission (Feb. 17, 2003). Where the Indiana Commission notes:

> "Ameritech has argued . . . the Commission lacks the legal authority to order it to file a tariff or even make the rates that we establish herein effective . . .[and that] . . . we are required to implement such rates through individual interconnection agreements. {Footnote 81} We disagree. It is without dispute that the rates we adopt here all further the goal expressed in Indiana law to advance competition. Thus, Indiana

necessary direction to resolve these important jurisdictional disputes and conserve the federal courts and State commission resources.

OPINIONS BELOW

The opinion Wisconsin has asked this Court to review is reported at *Wisconsin Bell, Inc., v. Bie, et al.*, 340 F.3d 441 (7th Cir. 2003). The decision of the United States District Court for the Western District of Wisconsin is *Wisconsin Bell, Inc., d/b/a Ameritech Wisconsin v. Bie, et al.*, Case No. 01-C-0690-C (W. D. Wis. September 26, 2002) and is unreported. The Wisconsin decision that generated the appeal is in two parts in *Investigation Into Ameritech Wisconsin Operational Support Systems*, Docket No. 6720-

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and other states clearly can advance regulatory rules and laws that affirmatively promote valid state aims, including promulgating pro-competitive regulatory approaches such as the new rates' implementation mechanism. As a result, we find that Ameritech is ordered to file . . .tariffs incorporating the revised rates resulting from those revised studies....

{Footnote 3} The Commission notes that Ameritech argued the contrary in several interconnection arbitration proceedings . . . claim[ing] that arbitration of an interconnection agreement between two carriers is not the proper proceeding in which to establish or change the rates charged for UNEs that may affect all CLECs but that such charges may only be established in generic cost dockets such as the one at issue here. See, e.g., the Commission's August 7, 2002, Order in Cause No. 42144-INT-01: *In the Matter of Petition of BuyTel Communications, Inc. for Arbitration Pursuant to Section 252(B) to Resolve Open Issues for an Interconnection Agreement with Ameritech Indiana* (p.7). {Emphasis Added}.

TI-160 (Pub. Serv. Comm'n Wis. Sept. 25, 2001)(Final Decision (Phase I)) and (Pub. Serv. Comm'n Wis. Nov. 14, 2001)(Order Denying Rehearing and Corrections to Final Decision (Phase I)) (collectively, "*OSS Final Decision*"). Only the Final Decision (Phase I) is reported in electronic format, at 2001 WL 1671061. All of the foregoing decisions are set forth in the Appendix of the Petition for a Writ of Certiorari filed by WorldCom, Inc., in *Wisconsin Bell, Inc., v. Bie, et al.*, 340 F.3d 441 (7th Cir. 2003), *petition for cert. filed,* (U.S. Oct. 17, 2003)(No. 03-603).[8]

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its opinion and entered judgment on August 12, 2003. Wisconsin filed their Petition for a Writ of Certiorari within 90 days of the entry of judgment – invoking the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns the interpretation and application of the certain sections of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996). The principal sections at issue are codified at 47 U.S.C. §§ 251, 252, and 261. Also at issue is § 601(c)(1) of the Act, which is published as an uncodified note to 47 U.S.C. § 152.

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[8] Hereinafter all references to pages of the Appendix of WorldCom's Petition for a Writ of Certiorari (U.S. 03-603) will be denoted by "Ap-W.," followed by the relevant page number.

STATEMENT OF THE CASE

Mindful of the admonitions of U.S. Sup. Ct. Rule 37, and because NARUC only recently discovered that Wisconsin filed this petition, NARUC adopts by reference the Statement of the Case presented in Wisconsin's Petition for a Writ of Certiorari.

ARGUMENT SUMMARY

The Seventh Circuit's erroneous ruling effectively preempts any State administrative device, tariff or otherwise, that is the least bit different from the procedures in § 252 of the Act. The history, purpose, and literal text of the 1996 Act simply do not support the such an interpretation. The Act was enacted against the background of the States' historic exclusive jurisdiction over intrastate telecommunications under § 152(b). By 1996, several States were already using that authority to impose unbundling requirements analogous to those authorized by § 251. When federal law enters into such an area previously subject to State police power regulation, there is a particularly strong presumption that Congress did not mean to oust State law. *See Cipollone,* 505 U.S. at 518. Rather than displace State authority generally, the Act expressly preempts only State law entry barriers while enacting four separate savings clauses that authorize States to enact or enforce additional procompetitive requirements under State law (47 U.S.C. §§ 251(d)(2), 252(e)(3), 253(c), 261(c)), so long as they are not inconsistent with the minimum federal requirements: *i.e.* by "lowering" the federal floor. The Act is analogous to the

numerous other federal statutes that place a floor under state regulation of the same subjects but not a ceiling above them. In contrast, Congress knows full well how to draft statutory language that serves as floor and a ceiling, and, when it does so, it expressly preclude States from imposing requirements that "differ" from, are "in addition to," or are not "identical" to, federal obligations. Congress did not use any of these time-honored formulations in the 1996 Act.

ARGUMENT

The history, purpose, and literal text of the 1996 Act do not support the Seventh Circuit's decision.

Again mindful of the admonitions of U.S. Sup. Ct. Rule 37 concerning original material potentially helpful to the Court, NARUC fully endorses the arguments presented in Wisconsin's Petition for a Writ of Certiorari and offer only the following amplifications of those arguments.

The Seventh Circuit's erroneous ruling effectively preempts any State administrative device, tariff or otherwise, that is the least bit different from the procedures in § 252 of the Act. Contrary to the letter and the intent of the Act, the Seventh Circuit's ruling effectively declares that "consistent with the Act" really means "identical to the Act." This basically eliminates a State commission's ability to advance any state pro-competition measure that is consistent with Act, but may go beyond the Act's minimums. The history, purpose, and literal text of the 1996 Act simply do not support the such an interpretation.

Any analysis of the preemptive scope of a federal statute must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose," *Morales v. TWA*, 504 U.S. 374, 383 (1992), and with recognition that there is a "presumption *against* the preemption of State police power measures," *Cipollone v. Ligget Group*, 505 U.S. 504, 518 (1992) (emphasis added). Here, the history, terms, structure, and purposes of the Act make it explicit that § 251-2 and the FCC's implementing regulations are *minimum* requirements that establish a federal "floor" and that States can impose additional unbundling obligations under State law. The Act was enacted against the background of the States' historic exclusive jurisdiction over intrastate telecommunications under § 152(b). By 1996, several States were already using that authority to impose unbundling requirements analogous to those authorized by § 251. When federal law enters into such an area previously subject to State police power regulation, there is a particularly strong presumption that Congress did not mean to oust State law. *See Cipollone,* 505 U.S. at 518.

Rather than displace State authority generally, the Act expressly preempts only State law entry barriers while enacting four separate savings clauses that authorize States to enact or enforce additional procompetitive requirements under State law (47 U.S.C. §§ 251(d)(2), 252(e)(3), 253(c), 261(c)), so long as they are not inconsistent with the minimum federal requirements: *i.e.* by "lowering" the federal

floor. *See CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (savings clauses are "the best evidence of Congress' preemptive intent"). Further, the Act did not repeal § 152(b), and as this Court has held, States continue to have exclusive jurisdiction to regulate the rates that incumbents charge for local and other intrastate services – either directly or indirectly – and to adopt the policies that directly determine the extent to which incumbents (and others) will have incentives to invest and innovate. *Iowa Utilities Board v. FCC,* 525 U.S. 366, n.8 (1999).

Even more clearly, § 251(d)(3) itself precludes the Seventh Circuit's restrictive conclusions. Entitled "Preservation of State Access Regulations," it prohibits the FCC from prescribing or enforcing regulations that preclude the enforcement of State access and interconnection rules that are "consistent" with the requirements of § 251 and that do not "substantially prevent implementation" of the requirements of that section or the purposes of the Act's local competition provisions. It it is, of course, a limitation on federal power, *not a limitation on the States' role.* Further, this Court has held that State regulations are "consistent" with federal law so long as it is "possible to comply with the State law without triggering federal enforcement action," *Jones v. Rath Packing*, 430 U.S. 519, 540 (1977). By instead *permitting* States to impose additional access obligations so long as they are "consistent" with the requirements of § 251 (§ 251(d)(3)(B)), and do not "substantially prevent implementation" of the "requirements" of that section (§ 251(d)(3)(C)), Congress clearly outlawed only State measures that would preclude or substantially prevent the use of network elements to provide competing services, *not* provisions that would support the 1996 Act's goal of "eliminat[ing] the monopolies enjoyed by the inheritors of AT&T's local franchises . . . as an end in

itself" and "giv[ing] aspiring competitors every incentive to enter local retail telephone markets, short of confiscating the incumbents' property." *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 489. Thus, § 251(d)(3) bars only State measures that would require incumbents to violate the Act or would legally preclude or have the effect of precluding competitors from obtaining elements and using them to provide competing services.

Congress was fully aware at the time of the Act's passage that several States had already passed laws aimed at opening local markets to competition, *see* S. Rep. at 5 (noting that "[s]everal States . . . have taken steps to open the local networks of telephone companies"), and expressly sought to build on these State efforts. If Congress had intended to preempt those State laws, it could have done so expressly, as it did with State laws that restrict competition. *See* 47 U.S.C. § 253. Instead, Congress not only enacted the provisions preserving State law described above, it made clear that those provisions were intended to "prevent[] affected parties from asserting that the [Act] impliedly pre-empts other laws." Conf. Rep. At 201, *reprinted in* 1996 U.S.C.C.A.N. 124, 215.

The import of the words "consistent" and "inconsistent" in the savings clauses such as § 251(d)(3) is well illustrated by *California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272 (1987). There, the Supreme Court held that a California law extending more generous leave benefits to pregnant workers than those provided by the federal Pregnancy Discrimination Act was not preempted by that statute. The applicable savings clause directed that no "provision of this Act [shall] be construed as invalidating any provision of State law unless such provision

is *inconsistent* with any of the purposes of this Act, or any provision thereof." *Id.* at 282 (quoting 42 U.S.C. § 2000h-4) (emphasis added). The Court held that the Act was "a floor beneath which pregnancy disability benefits may not drop – *not* a ceiling above which they may not rise." *Id.* at 285 (emphasis added). *See also Illinois Ass'n of Mortgage Brokers v. Office of Banks and Real Estate*, 308 F.3d 762, 765-66 (7th Cir. 2002) (holding that a State law is "inconsistent" with a federal statute only if it is "more tolerant than the federal floor"); *see also E.B. Elliott Adver. Co. v. Metro. Dade County*, 425 F.2d 1141, 1150 (11th Cir. 1970) ("The word 'inconsistent,' as used in [a preemption provision] means contradictory in the sense of legislative provisions which cannot co-exist."); *Jersey Cent. Power & Light Co. v. Township of Lacey*, 772 F.2d 1103, 1113 (3d Cir. 1985) ("A state or local law is 'inconsistent' with federal requirements under the [law] when it is not possible to comply with both, or where state requirements are an obstacle to an execution of federal law.").

The Act is therefore analogous to the numerous other federal statutes that place a floor under State regulation of the same subjects but not a ceiling above them. *See, e.g., Atherton v. FDIC*, 519 U.S. 213, 216 (1997) ("We conclude that State law sets the standard of conduct as long as the State standard (such as simple negligence) is stricter than that of the federal statute. The federal statute nonetheless sets a 'gross negligence' floor, which applies as a substitute for state standards that are more relaxed."); *Old Bridge Chems., Inc. v. New Jersey Dept. of Environmental Protection*, 965 F.2d 1287, 1292 (3d Cir. 1992) ("[A]lthough waste management may be an area of overriding national

importance, in legislating in the field Congress has set only a floor, and not a ceiling, beyond which states may go in regulating the treatment, storage, and disposal of solid and hazardous wastes."); *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1454 (6th Cir.1991) ("CERCLA sets only a floor, not a ceiling, for environmental protection. Those state laws which establish more stringent environmental standards are not preempted by CERCLA."); *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1543 (D.C. Cir. 1984) ("[F]ederal legislation has traditionally occupied a limited role as the floor of safe conduct; before transforming such legislation into a ceiling on the ability of states to protect their citizens, and thereby radically adjusting the historic federal-state balance, courts should wait for a clear statement of congressional intent to work such an alteration." (internal citation omitted)); *Wastak v. Lehigh Valley Health Network*, 342 F.3d 281, 295 n.8 (3d Cir. 2003) (Older Workers Benefit Protection Act "was enacted to establish a floor, not a ceiling." (internal quotation marks and alterations deleted)). These decisions recognize the general principle that "a state or locality's imposition of additional requirements above a federal minimum is unlikely to create a direct and positive conflict with federal law." *Southern Blasting v. Wilkes County*, 288 F.3d 584, 591 (4th Cir. 2002).

In contrast, Congress knows full well how to draft statutory language that serves as floor and a ceiling, and, when it does so, it expressly preclude States from imposing requirements that "differ" from, are "in addition to," or are not "identical" to, federal obligations. *See, e.g.*, Medical Device Amendments Act, 21 U.S.C. § 360k(a)(1) ("no State

may establish or continue in effect . . . any requirement which is different from, or in addition to, any requirement applicable under this chapter"); Federal Boat Safety Act of 1971, 46 U.S.C. § 4311 (preempting state "law or regulation . . . that is not identical to a regulation prescribed under section 4302 of this title"); Consumer Product Safety Act, 15 U.S.C. § 2075(a) ("no State or political subdivision of a State shall have any authority [to establish a safety requirement], unless such requirements are identical to the requirements of the Federal standard"); Federal Hazardous Substances Act, 15 U.S.C. § 1261 note (b)(1)(A) ("no State . . . may establish or continue in effect a cautionary labeling requirement . . . unless such cautionary labeling requirement is identical to the labeling requirement under 2(p) or 3(b)."). Congress did not use any of these time-honored formulations in the 1996 Act.

CONCLUSION

Based on the forgoing, Petitioners respectfully request grant of the writ of certiorari. Respectfully Submitted

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